

APPEAL NO. 180328
FILED APRIL 9, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 10, 2018, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to left knee post-traumatic osteoarthritis; (2) the compensable injury of (date of injury), does not extend to left knee internal derangement; (3) the respondent/cross-appellant (claimant) reached maximum medical improvement (MMI) on October 26, 2016; (4) the claimant's impairment rating (IR) is four percent; and (5) the claimant had disability from October 27, 2016, through the date of the CCH, resulting from the injury sustained on (date of injury).

The appellant/cross-respondent (carrier) appealed that portion of the ALJ's extent-of-injury determination that the compensable injury of (date of injury), extends to left knee post-traumatic osteoarthritis as well as the ALJ's disability determination. The appeal file does not contain a response from the claimant to the carrier's appeal. The claimant appealed, disputing that portion of the ALJ's extent-of-injury determination that the compensable injury does not extend to left knee internal derangement as well as the ALJ's MMI and IR determinations. The carrier responded, urging affirmance of the determinations disputed by the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury); the carrier accepted a left knee sprain/strain and a left knee medial collateral ligament (MCL) tear as the compensable injury; and that (Dr. F) was appointed by the Texas Department of Insurance, Division of Workers' Compensation (Division) to determine MMI, IR, the extent of the claimant's compensable injury, and the claimant's ability to return to work. The claimant testified that he injured his left knee when he stepped on something when he went to pick up a piece of plywood. The claimant testified his left leg went to the left and his body went to the right and he heard a pop.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error,

unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury of (date of injury), extends to left knee post-traumatic osteoarthritis is supported by sufficient evidence and is affirmed.

The ALJ's determination that the compensable injury of (date of injury), does not extend to left knee internal derangement is supported by sufficient evidence and is affirmed.

DISABILITY

The ALJ's determination that the claimant had disability for the compensable injury of (date of injury), from October 27, 2016, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

Dr. F, the Division-appointed designated doctor, initially examined the claimant to opine on MMI/IR on March 2, 2016, and certified that the claimant had not reached MMI considering the conditions of left ankle sprain/strain and left knee sprain/strain. As previously noted the ALJ's determination that the compensable injury extends to left

knee post-traumatic osteoarthritis was affirmed. Further, it has not yet been determined that the compensable injury of (date of injury), extends to a left ankle sprain/strain. This certification does not rate the entire compensable injury and rates conditions that have not yet been determined to be compensable and cannot be adopted.

Dr. F examined the claimant again on June 10, 2016, and certified that the claimant had not yet reached MMI. The only condition included in this certification is left knee internal derangement. As previously noted, the ALJ's determination that the compensable injury of (date of injury), does not extend to left knee internal derangement was affirmed. This certification rates a condition that has been determined is not part of the compensable injury and cannot be adopted.

Dr. F subsequently examined the claimant on January 28, 2017, and certified that the claimant reached MMI on October 26, 2016, with a four percent IR. This certification considered and rated left knee strain and left knee internal derangement. This certification rated a condition that has been determined not to be part of the compensable injury (left knee internal derangement) and failed to consider and rate conditions that are part of the compensable injury. Accordingly, this certification cannot be adopted.

Dr. F examined the claimant on September 26, 2017, and again certified that the claimant reached MMI on October 26, 2016, with an IR of four percent. Dr. F provided three certifications with the same MMI date and IR. The first certification considered and rated a left knee sprain/strain and left knee MCL tear. However, as previously noted the ALJ's determination that the compensable injury includes left knee post-traumatic osteoarthritis has been affirmed. This first certification does not consider the entire compensable injury and cannot be adopted.

The second certification from Dr. F with an examination date of September 26, 2017, certified the claimant reached MMI on October 26, 2016, with a four percent IR. This certification considered and rated, in part, left knee internal derangement which has been determined not to be part of the compensable injury. This second certification considers and rates a condition that has been determined not to be part of the compensable injury and cannot be adopted.

The third certification from Dr. F with an examination date of September 26, 2017, certified the claimant reached MMI on October 26, 2016, with a four percent IR. This certification considered and rated, in part, left knee internal derangement which has been determined not to be part of the compensable injury as well as arthritis separate and apart from left knee post-traumatic osteoarthritis. This certification considers and rates a condition that has been determined not to be part of the compensable injury (left knee internal derangement) and cannot be adopted.

There is only one other certification in evidence. (Dr. K), the claimant's treating doctor, certified that the claimant had not yet reached MMI based on the examination performed on March 6, 2017. The certification from Dr. K considers a left knee medial meniscus tear and fails to consider conditions which have been determined to be part of the compensable injury including left knee post-traumatic osteoarthritis.

Section 401.011(30) provides that MMI means the earlier of:

- A. the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated;
- B. the expiration of 104 weeks from the date on which income benefits begin to accrue; or
- C. the date determined as provided by Section 408.104.

The parties did not stipulate to the date of statutory MMI and the disability issue before the ALJ was for a defined period. There was no evidence as to when disability initially began. It is possible that the date of statutory MMI occurred prior to the date of the January 10, 2018, CCH.

There are no other certifications in evidence. Accordingly, we reverse the ALJ's determination that the claimant reached MMI on October 26, 2016, and that the claimant's IR is four percent and remand the MMI and IR issues to the ALJ for further action consistent with this decision.

SUMMARY

We affirm the ALJ's determination that the compensable injury of (date of injury), extends to left knee post-traumatic osteoarthritis.

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to left knee internal derangement.

We affirm the ALJ's determination that the claimant had disability for the compensable injury of (date of injury), from October 27, 2016, through the date of the CCH.

We reverse the ALJ's determination that the claimant reached MMI on October 26, 2016, and remand the MMI issue to the ALJ.

We reverse the ALJ's determination that the claimant's IR is four percent and remand the IR issue to the ALJ.

REMAND INSTRUCTIONS

Dr. F is the designated doctor in this case. On remand the ALJ is to determine whether Dr. F is still qualified and available to be the designated doctor. If Dr. F is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI date and IR for the (date of injury), compensable injury.

The ALJ is to advise the designated doctor that the compensable injury of (date of injury), extends to left knee sprain/strain, left knee MCL tear, and left knee post-traumatic osteoarthritis but does not extend to left knee internal derangement.

On remand the ALJ is to request the parties to stipulate to the date of statutory MMI. If the parties are unable to stipulate, the ALJ is to make a finding of fact of that date.

The ALJ is to request the designated doctor to give an opinion on the claimant's date of MMI and rate the entire compensable injury in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), and considering the medical record and the certifying examination. The certification of MMI cannot be later than the statutory MMI date.

The parties are to be provided with the ALJ's letter to the designated doctor and the designated doctor's response. The parties are to be allowed an opportunity to respond.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Margaret L. Turner
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Carisa Space-Beam
Appeals Judge